

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION     )  
FOR TRANSFER NO. 5487 IN THE     )  
NAME OF TONY VISSER C/O         )  
BIG SKY DAIRY                     )  
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**PRELIMINARY ORDER**

(Note: This order has now become final because  
exceptions were not filed)

This matter having come before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

**FINDINGS OF FACT**

1. On December 29, 1997, the Snake River Basin Adjudication ("SRBA") court issued a partial decree to Don McFarland and Carol McFarland as follows:

Identification. No:       **36-02671D**  
Source:                   Groundwater  
Priority:                  January 9, 1967  
Rate of diversion:       2.36 cubic feet per second ("cfs")  
Volume:                  683.6 AF per annum ("AFA")  
Points of diversion:     Lot 4, Section 1, Lots 1 and 3, Section 2 and Lot 1, Section 3, T7S,  
                              R14E, B.M., Gooding County  
Use:                      Irrigation  
Place of use:             992 acres in parts of Section 33, T6S, R14E, B.M. and  
                              Sections 1, 2 and 3, T7S, R14E, B.M., Gooding County  
Conditions of approval: Use of the rights listed below is limited to the irrigation of a combined  
                              total of 992 acres in a single irrigation season. Combined right nos. 36-  
                              02671D, 36-07367D, 36-07381D, 36-07445D and 36-07480E.

*(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).*

2. On August 1, 1985, the Department issued Approved Transfer No. 3064 in the name of Don and Carol McFarland as follows:

Identification. No:       **36-07157** (part)  
Source:                   Groundwater  
Priority:                  February 16, 1971  
Rate of diversion:       4.13 cfs  
Volume:                  1,240 AFA  
Point of diversion:     Lot 1, Section 3, T7S, R14E, B.M., NENW Section 33, T6S, R14E, B.M.,  
                              Gooding County  
Use:                      Irrigation  
Season of use:           April 1 to November 1  
Place of use:             310 acres in parts of Section 33, T6S, R14E, B.M., Gooding County

3. On December 29, 1997, the Snake River Basin Adjudication ("SRBA") court issued a partial decree to Don McFarland and Carol McFarland as follows:

Identification. No: **36-07367D**  
Source: Groundwater  
Priority: August 13, 1973  
Rate of diversion: 8.29 cfs  
Volume: 1896.8 AFA  
Points of diversion: Lot 4, Section 1, Lots 1 and 3, Section 2 and Lot 1, Section 3, T7S, R14E, B.M., Gooding County  
Use: Irrigation  
Place of use: 992 acres in parts of Section 33, T6S, R14E, B.M. and Sections 1, 2 and 3, T7S, R14E, B.M., Gooding County  
Conditions of approval: Use of the rights listed below is limited to the irrigation of a combined total of 992 acres in a single irrigation season. Combined right nos. 36-02671D, 36-07367D, 36-07381D, 36-07445D and 36-07480E.

4. On December 29, 1997, the Snake River Basin Adjudication ("SRBA") court issued a partial decree to Don McFarland and Carol McFarland as follows:

Identification. No: **36-07381D**  
Source: Groundwater  
Priority: September 19, 1973  
Rate of diversion: 1.38 cfs  
Volume: 274.8 AFA  
Points of diversion: Lot 4, Section 1, Lots 1 and 3, Section 2 and Lot 1, Section 3, T7S, R14E, B.M., Gooding County  
Use: Irrigation  
Place of use: 992 acres in parts of Section 33, T6S, R14E, B.M., Sections 1, 2 and 3, T7S, R14E, B.M., Gooding County  
Conditions of approval: Use of the rights listed below is limited to the irrigation of a combined total of 992 acres in a single irrigation season. Combined right nos. 36-02671D, 36-07367D, 36-07381D, 36-07445D and 36-07480E.

5. On January 8, 1998, the Snake River Basin Adjudication ("SRBA") court issued a partial decree to Don McFarland and Carol McFarland as follows:

Identification. No: **36-07445D**  
Source: Groundwater  
Priority: February 21, 1974  
Rate of diversion: 2.42 cfs  
Volume: 487.6 AFA  
Points of diversion: Lot 4, Section 1, Lots 1 and 3, Section 2 and Lot 1, Section 3, T7S, R14E, B.M., Gooding County  
Use: Irrigation  
Place of use: 992 acres in parts of Section 33, T6S, R14E, B.M., Sections 1, 2 and 3, T7S, R14E, B.M., Gooding County  
Conditions of approval: Use of the rights listed below is limited to the irrigation of a combined total of 992 acres in a single irrigation season. Combined right nos. 36-02671D, 36-07367D, 36-07381D, 36-07445D and 36-07480E.

6. On December 29, 1997, the Snake River Basin Adjudication ("SRBA") court issued a partial decree to Don McFarland and Carol McFarland as follows:

Identification. No: **36-07480E**  
Source: Groundwater  
Priority: May 31, 1974  
Rate of diversion: 5.46 cfs  
Volume: 1308.8 AFA  
Points of diversion: Lot 4, Section 1, Lots 1 and 3, Section 2 and Lot 1, Section 3, T7S, R14E, B.M., Gooding County  
Use: Irrigation  
Place of use: 992 acres in parts of Section 33, T6S, R14E, B.M., Sections 1, 2 and 3, T7S, R14E, B.M., Gooding County  
Conditions of approval: Use of the rights listed below is limited to the irrigation of a combined total of 992 acres in a single irrigation season. Combined right nos. 36-02671D, 36-07367D, 36-07381D, 36-07445D and 36-07480E.

7. On March 2, 1999, Tony Visser c/o Big Sky Dairy ("applicant") filed Application for Transfer No. 5464 ("application") with the Department seeking to change parts of the above listed water rights used for irrigation to stockwater and commercial uses in a dairy. The proposed rate of diversion is 2.33 cfs and the volume is 395.1 AF. Two new wells are proposed within the SENE Section 3, T7S, R14E, B.M. The place of use is within parts of Sections 33 and 34, T6S, R14E, B.M. and parts of Section 3, T7S, R14E, B.M. The applicant proposes 5,000 milking cows and 1,810 dry cows at the dairy site in Gooding County.

8. The water for the dairy is represented by the following water rights:

<u>Water right</u>	<u>Priority</u>	<u>CFS</u>	<u>AF</u>
36-02671 (part) 01-09-1967		0.19	40.8
36-07157 (part) 02-16-1971		0.83	172.8
36-07367 (part) 08-13-1973		0.66	112.8
36-07381 (part) 09-19-1973		0.11	16.2
36-07445 (part) 02-21-1974		0.19	29.1
36-07480 (part) 05-31-1974		0.43	77.7
<b>TOTAL</b>		<b>2.33</b>	<b>395.1</b>

To make this water available, the applicant proposes to dry up 131.7 acres as follows:

T6S, R14E, B.M.  
Section 33 - SWNE - 1.7 ac, SENW - 29.5 ac, NESW - 25.1 ac, NWSE - 8.9 ac, SWSE - 19.8 ac, SESE - 28.7 ac  
T7S, R14E, B.M.  
Section 3 - Lot 1 - 13.9 ac, Lot 2 - 4.1 ac, all in Gooding County

9. The Department published notice of the application which was subsequently protested by Luke and Rose Phillips, Vonnie L. Peterson, Harvey and Jean Maxwell, Michael and Dianna Miketa ("protestants"). Harvey and Jean Maxwell subsequently withdrew their protest.

10. On November 23, 1999, the Department conducted a hearing in the matter. The applicant was present and was represented by Robert E. Williams. Protestants Michael Miketa, Luke Phillips and Vonnie L. Peterson were present and represented themselves.

11. Issues identified by the protestants are as follows:
  - a. The proposed changes will injure other water rights.
  - b. The proposed changes will constitute an enlargement in use of the original right.
  - c. The proposed changes are not in the local public interest.
  - d. The proposed changes are not consistent with the conservation of water resources within the state of Idaho.
12. Exhibits premarked, offered or accepted as a part of the record are as follows:
  - a. Applicant's Exhibit A - Site Vicinity Map - Big Sky North #2 Dairy
  - b. Applicant's Exhibit B - Location Map - Big Sky West
  - c. Applicant's Exhibit C - Nutrient Management Plan for Big Sky North #2 Dairy
  - d. Applicant's Exhibit D - Dairy Waste System Calculations
  - e. Applicant's Exhibit E - Letter dated March 1, 1999 to Big Sky North #2 Dairy from Stephen N. Thompson together with soils data information and soils data map
  - f. Applicant's Exhibit F - Well Driller Reports and pump test data
  - g. Applicant's Exhibit G - Analysis of Water Right Transfer to Dairy by Brockway Engineering dated October 29, 1999
  - h. Applicant's Exhibit H - Well Interference Analysis - Big Sky North #2 Dairy
  - i. Applicant's Exhibit I - Well Interference Analysis - Big Sky North #2 Dairy
  - j. Applicant's Exhibit J - Livestock Confinement Operations - Water Requirements and Consumptive Use Worksheet
  - k. Applicant's Exhibit K - Gooding County - New CAFO Siting Permit
  - l. Applicant's Exhibit - L - Letter Dated November 3, 1999 to Russell Visser from Philip J. DeRenzis
  - m. Applicant's Exhibit M - Barn Water Chart
  - n. Applicant's Exhibit N - Letter dated November 5, 1999 from Del Holyoak
  - o. Applicant's Exhibit O - Letter dated November 5, 1999 from John Faulkner
  - p. Applicant's Exhibit P - Letter dated November 5, 1999 from L.R. "Rusty" Gillette
  - q. Applicant's Exhibit Q - An Evaluation of the Idaho Dairy Pollution Prevention Initiative 1996 - 1998
  - r. Applicant's Exhibit R - USDOJ-BLM Gooding County Landfill - Tuttle Preliminary Assessment

- s. Applicant's Exhibit S - Letter dated March 11, 1999 to Judy Daubner from Marv Patten
- t. Applicant's Exhibit T - Snake Plain Aquifer
- u. Applicant's Exhibit U - Gooding County 1995 Annual Groundwater Monitoring Report
- v. Applicant's Exhibit V - Gooding County 1996 Annual Groundwater Monitoring Report
- w. Applicant's Exhibit W - Gooding County 1997 Annual Groundwater Monitoring Report
- x. Applicant's Exhibit X - Gooding County Landfill - 1998 - Annual Groundwater Monitoring Report

13. Gooding County has issued a New CAFO Siting Permit to the applicant for 4,767 animal units. The applicant intends to apply to the county for additional animals at the dairy. (See Applicant's Exhibit K).

14. The applicant intends to buy hay, grain and other feed for the dairy cattle from local producers.

15. The design of the dairy provides for three separation systems to separate solid waste from liquid waste before liquid waste reaches the main lagoon. Corrals are maintained by scraping rather than by washing. Water is recycled 3 or 4 times before it is no longer used in the dairy.

16. The rate of diversion, consumptive use and total volume of water diverted will not be larger after the transfer than before the transfer. (See Applicant's Exhibit G).

17. Using an average annual pumping rate of 0.55 cfs, which is the continuous diversion rate to provide the required annual volume of water and a pumping period of 80 days, the estimated drawdown in a well 1/4 mile distant from the dairy wells is 0.5 feet. Using a maximum pumping rate of 2.33 cfs for 12 days, the estimated drawdown in a well 1/4 mile distant from the dairy wells is about 0.9 feet. (See Applicant's Exhibit H).

18. Protestant Miketa lives within a mile of the dairy cow confinement area. He and the other protestants are concerned that the concentration of dairies in the vicinity of the applicant's proposed dairy will degrade water quality by increasing nitrates in the groundwater. Protestant Miketa questioned the adequacy of the nutrient management plan of the applicant and was concerned about pollution of ground water and reduced ground water levels.

19. The protestants did not introduce technical evidence to show that the proposal of the applicant will injure other water rights, will enlarge the use of water under the right being transferred, is not in the local public interest or is not consistent with the conservation of water resources within the state of Idaho.

## **CONCLUSIONS OF LAW**

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code; ....

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

5. The proposed changes will not injure other water rights.

6. The proposed changes do not constitute an enlargement in use of the original right.

7. The proposed changed uses of water are as efficient as other similar uses of water for dairy uses within the area and are consistent with the local public interest and conservation of water resources within the state of Idaho.

8. The Department should approve the application with certain conditions.

## **ORDER**

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5487 in the name of Tony Visser c/o Big Sky Dairy is **APPROVED** subject to the following conditions:

1. The right holder shall design and construct the dairy facility to assure that it is capable of complying with the resource protection requirements of the Division of Environmental Quality of the Idaho Department of Health and Welfare and of the Idaho Department of Agriculture. Within one year of this approval, the right holder shall provide evidence to the Department that the facility has been constructed to meet these compliance requirements. The Director can extend the time for demonstrating compliance upon written request of the applicant and a showing of good cause therefor.
2. Prior to diversion of water under this approval, the right holder shall install measuring devices acceptable to the Department and shall measure and annually report to the Department the amount (cfs and AF) of water diverted under this transfer. Reporting through a measuring district or a ground water district will suffice although the Director may require more frequent measuring and reporting.
3. The place of commercial use authorized by this transfer includes land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this approval shall not be used for irrigation unless the water is first beneficially used in the dairy as authorized by this transfer.
4. The acres which are no longer authorized for irrigation under this transfer total 131.7 as shown below:

T6S, R14E, B.M.

Section 33 - SWNE - 1.7 ac, SENW - 29.5 ac, NESW - 25.1 ac, NWSE - 8.9 ac,  
SWSE - 19.8 ac, SESE - 28.7 ac

T7S, R14E, B.M.

Section 3 - Lot 1 - 13.9 ac, Lot 2 - 4.1 ac

5. Rights 36-02671G, 36-07367G, 36-07381G, 36-07445G and 36-07480H when combined shall not exceed a total diversion rate of 1.5 cfs.
6. The right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
7. The right holder is not authorized to divert water under this transfer for more dairy cattle than authorized by the county.
8. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval, unless extended for cause by the Director.
9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Signed this 29th day of December, 1999.

/signed/

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L. GLEN SAXTON  
Hearing Officer